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NO. 87-575

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY MEMORANDUM

From a reading of The Daily Press, Inc.'s Brief in Opposition to the Petition for a Writ of Certiorari, it is clearly evident that The Daily Press, the employer in this ADEA case, has had great difficulty in identifying and responding to the two issues presented by the petitioners, Morse and Sullivan. Throughout its Brief, The Daily Press consistently refers to and discusses, often at length, irrelevant facts and arguments not raised in the Petition.[1] This leads to the strong suspicion that such extensive use of irrelevancies was deliberate and was an attempt to confuse the real issues presented.

[1] Some examples of irrelevant facts and non-issues are: constant reference to Section 626(e)(2), see pp. i, iv, 2, 16, and 27-30; irrelevant personal data on Sullivan, see pp. 7-8; failure to post

(Footnote continued next page)

In response to the few legal arguments, which could be considered reasonably related to the issues presented, The Daily Press' first contention concerns its interpretation of the relationship between this Court's holding in Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and the 10th Circuit's holding

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(Footnote 1 continued from prior page) multiple notices, see pp. 38-40; non-observance of notice, see pp. 35-38; mere ignorance of law as no excuse to permit equitable modification, see pp. 43-44; its repeatedly illogical conclusion that because Sullivan admitted that he was aware of civil rights issues, specifically race and sex discrimination issues, he therefore had to be aware of the age discrimination law in spite of the undeniable fact that they are separate laws, passed at different times and represent different types of discrimination, see pp. 7-9, 51-52; and last, but not least, its convoluted argument not accepted by either lower court, that any knowledge about a local age (and sex) discrimination case constructively imputes knowledge of the age discrimination law and its provisions to Sullivan. See pp. 7-9, 51-52.

in Wilkerson v. Siegfried Ins. Agency, 621 F.2d 1042 (10th Cir. 1980). See Brief in Opposition at 22-23. The Daily Press contends that the ruling in Celotex negates the decision in Wilkerson because that court partially based its decision on the fact that none of the defendant's affidavits controverted allegations in the plaintiff's complaint that the reasons given for plaintiff's discharge were pretextual. The Daily Press' contention is without foundation. This Court in Celotex held that the moving party in a Rule 56, or summary judgment motion, is not required to support its motion with affidavits or other materials negating the nonmoving party's claim, where the nonmoving party has failed to show that there is a genuine issue of fact. In the Wilkerson case, the moving party filed affidavits in support of its motion;

however, that court found that those affidavits did not negate an issue of material fact, i.e., that the plaintiff had been discharged for pretextual reasons. Since an issue of fact existed, that court properly denied summary judgment, and remanded the case for a hearing on the question of equitable tolling. Wilkerson, 621 F.2d at 1045.

The Daily Press' real response to the issue of an evidentiary hearing for questions of equitable modification of time limitation periods in ADEA cases can be found in a footnote. See Brief in Opposition, note 4 at 22-23. The brevity of this response and the lack of explanation as to the significance of The Daily Press' observations on the cases make further discussion by petitioners generally unnecessary. Suffice it to say

that in Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982), there was an evidentiary hearing.

The Daily Press' argument in response to Morse's equitable tolling argument is misplaced since it relies on the wrong standard by misidentifying the basis of Morse's position as "equitable estoppel." "Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987). For example, equitable tolling would apply where there is a question of pretextual reasons given for a discharge, see, e.g., Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042 (10th Cir. 1980), or where there is a question of failure to post the notice conspicuously as required by 29 U.S.C.

Section 627, see, e.g., Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

"Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." English, 828 F.2d at 1049. In the present case, since the plaintiffs have consistently denied any knowledge of their ADEA rights during the time limitation periods, equitable estoppel is inapplicable. However, as was the case at the District Court level in English, parties (and sometimes courts) often incorrectly use the terms interchangeably. Id.

As to the notice issue presented to this Court by petitioners, The Daily Press

responds by failing to focus on the crux of that issue, where the notice was posted, and the petitioners' contention that the wall of an interior office was not a conspicuous place as required. However, it is interesting to note that in its discussion of the non-issue of the posting of multiple notices, The Daily Press cites a list of cases, indicating where the notice was posted in each. See Brief in Opposition, at 39. Apparently, it failed to observe that none of those cases involved posting of a notice in an interior office,[2] the real point at issue here.

In response to the issue of consultation of an attorney during the

[2] In Butz v. Hertz Corp., 554 F. Supp. 1178 (W.D.Pa. 1983), which The Daily Press included in the list mentioned above, the notice was posted on a bulletin board in the open office area in the main office building above the desk of the city manager's secretary. Id. at 1181.

time limitation periods of the ADEA as an absolute bar to equitable modification, The Daily Press appears to rely on this Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) and quotes from that case. See Brief in Opposition at 44-45. However, the Link case is not even slightly factually or procedurally similar to the present case. In Link, this Court upheld the District Court's imposition of the involuntary dismissal of the case, as a sanction for the attorney's failure to prosecute the case during the six years it was before that court. The attorney's failures culminated in a failure to appear at the pretrial conference, and this led directly to the dismissal. Under all of the circumstances in that case, the dismissal was affirmed.[3]

[3] It should be noted that there was a strong dissent by Justice Black.

In the present case, Sullivan consulted an attorney specifically to defend his rights in his unemployment benefits case which was being contested by The Daily Press -- circumstances which The Daily Press has failed to address in its rendering of the facts of the case.[4] See Brief in Opposition at 5-6.

The Daily Press attempts to distinguish Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984), but this represents another failure. In Meyer, it points out that the equitable modification required was "due to certain misrepresentations by the employer, which Sullivan has been unable

[4] Sullivan consulted a second attorney only to determine if a libel action could be filed based on the statements of The Daily Press' representatives who testified at the unemployment benefits hearing.

to prove here." Brief in Opposition at 48. Of course, at this stage in the present case, Sullivan is under no obligation to prove his claim. What The Daily Press fails to address is the real issue raised in this case, i.e., the broad application of the rule that any consultation with an attorney is an absolute bar to equitable modification. Simply arguing that a majority of courts accept this rule is not responsive to the issue.

In its response, The Daily Press has not denied the importance and substantiality of the questions presented in this case by either obfuscation or ignoring them. In light of its inability to face the issues as presented in the petition, except by resort to inadequate legal arguments frequently supported by inappropriate legal authorities, Morse and

Sullivan's Petition for a Writ of Certiorari is actually strengthened, and petitioners suggest that a summary reversal is in order.

Respectfully submitted,

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